

KURT E. WILSON, ESQ. (121163)  
SCOTT A. MANGUM, ESQ. (260758)  
**SWEENEY, MASON, WILSON & BOSOMWORTH**  
A Professional Law Corporation  
983 University Avenue, Suite 104C  
Los Gatos, CA 95032-7637  
Telephone: (408) 356-3000  
Facsimile: (408) 354-8839

Attorneys for Plaintiffs  
KENNETH L. CRAWFORD and  
NEW HORIZON FOODS, INC.

DAVID M. GILMORE (105429)  
dgilmore@gwvm.com  
GILMORE, WOOD, VINNARD & MAGNESS  
P.O. Box 28907  
Fresno, CA 93729-8907  
Telephone: (559) 448-9800  
Facsimile: (559) 448-9899

Attorneys for ZACHARIA MELZER, YAEL  
MELZER, TOVA INDUSTRIES, LLC, a  
Kentucky limited liability company

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

KENNETH L. CRAWFORD, NEW  
HORIZON FOODS, INC., a California  
corporation,

Plaintiffs,

v.

ZACHARIA MELZER, YAEL MELZER,  
TOVA INDUSTRIES, LLC, a Kentucky  
limited liability company,

Defendants.

CASE NO. C 10-00280 RS

**STIPULATION AND REQUEST TO  
MODIFY DISCOVERY SCHEDULE  
BY EXTENDING BY 32 DAYS THE  
EXPERT DISCLOSURE DATES;  
[PROPOSED] ORDER THEREON**

Judge: Hon. Hon. Richard Seeborg

Pursuant to Federal Rule of Civil Procedure 16(b)(4), Plaintiffs Kenneth L.  
Crawford and New Horizon Foods, Inc. and Defendants Zacharia Melzer, Yael Melzer and  
Tova Industries, LLC hereby stipulate and request from this Court an order modifying the

1 discovery schedule in this case to extend the expert disclosure dates 32 days.

2 After extensive meeting and conferring between Plaintiffs and Defendants,  
3 Defendants have agreed to, and are, compiling and producing information and documents  
4 supporting their contention that the representations to Plaintiffs respecting gross profit  
5 margins, cost of sales and EBITDA were accurate, including, for example, in compliance  
6 with this Court's Order (copy attached as **Exhibit A**), which Plaintiffs believe requires  
7 such production. Plaintiffs' expert, Dana Basney, must review the information and these  
8 documents in order to prepare his expert report, which is currently due by January 28,  
9 2011. Due to the delays in the production of this information and these documents, the  
10 PMQ depositions for Tova and its accountants needed to be continued from Mid-January  
11 to February 16, 2011 and February 17, 2011, respectively, so that Defendants would have  
12 enough time to provide Plaintiffs the information and documents prior to the depositions.  
13 Mr. Basney believes that information obtained at the depositions may also impact his  
14 opinions and expert report.

15 Counsel for the Parties have met and conferred respecting the above. A true and  
16 correct copy of Counsels' correspondence is attached hereto as **Exhibit B**. The Parties  
17 agree that, given the delay in the production of documents, it is necessary to modify the  
18 current discovery schedule, as set forth in this Court's September 2, 2010 Case  
19 Management Scheduling Order. A true and correct copy of the September 2, 2010  
20 scheduling order is attached hereto as **Exhibit C**. As a result, the Parties hereby stipulate  
21 to the following modified discovery schedule:

- 22 1. On or before March 1, 2011, Plaintiffs shall disclose expert testimony and  
23 reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
- 24 2. On or before March 15, 2011, Defendants shall disclose expert testimony  
25 and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
- 26 3. On or before April 18, 2011, all discovery of expert witnesses pursuant to  
27 Federal Rule of Civil Procedure 26(b)(4) shall be completed;
- 28

1 4. On or before April 18, 2011, all non-expert discovery shall be completed by  
2 the parties in accordance with the provisions set forth in this Court's Case  
3 management Scheduling Order, dated September 2, 2010.

4 5. All pretrial motions shall be heard not later than May 2, 2011.

5 6. All other discovery and trial dates shall remain as set in the Court's  
6 September 2, 2010 Case Management Scheduling Order.

7 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

8 DATED: January 19, 2011

**GILMORE, WOOD, VINNARD & MAGNESS**

9  
10  
11 By: \_\_\_\_\_ /s/

David M. Gilmore

12 Attorneys for ZACHARIA MELZER, Yael  
13 MELZER, TOVA INDUSTRIES, LLC, a  
14 Kentucky limited liability company

15 DATED: January 19, 2011

**SWEENEY, MASON, WILSON &  
BOSOMWORTH**

16  
17  
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19 By: \_\_\_\_\_ /s/

KURT E. WILSON, ESQ.  
SCOTT A. MANGUM, ESQ.

20 Attorneys for Plaintiffs, KENNETH L.  
21 CRAWFORD, NEW HORIZON FOODS,  
22 INC.

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**PROPOSED ORDER MODIFYING DISCOVERY SCHEDULE**

The Court, having reviewed the Parties' Stipulation to Modify the Discovery Schedule in this case, and good cause appearing therefor, IT IS SO ORDERED that:

1. On or before March 1, 2011, Plaintiffs shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
2. On or before March 15, 2011, Defendants shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
3. On or before May 1, 2011, all discovery of expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(4) shall be completed;
4. On or before May 1, 2011, all non-expert discovery shall be completed by the parties in accordance with the provisions set forth in this Court's Case management Scheduling Order, dated September 2, 2010.
5. All pretrial motions shall be heard not later than May 2, 2011.
6. All other discovery and trial dates shall remain as set in the Court's September 2, 2010 Case Management Scheduling Order.

DATED: 1/20, 2011

  
HON. RICHARD SEEBORG  
United States District/Magistrate Judge

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**EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

KENNETH L. CRAWFORD, et al.,

Plaintiffs,

v.

ZACHARIA MELZER, et al.,

Defendants.

Case No.: C 10-0280 RS (PSG)

**ORDER GRANTING PLAINTIFFS' MOTION  
TO COMPEL FURTHER RESPONSES TO  
PLAINTIFFS' REQUEST FOR PRODUCTION  
OF DOCUMENTS NOS. 13, 17, 21 & 22**

**(Re: Docket No. 59)**

On January 4, 2011, the parties appeared for hearing on Plaintiffs' Motion to Compel Further Responses to Plaintiffs' Request for Production of Documents Nos. 13, 17, 21 & 22. Based on the briefs and arguments submitted,

IT IS HEREBY ORDERED that Plaintiffs' motion is GRANTED as to Document Request Nos. 13 and 17. Defendant shall produce all computer data files (in native format) in the possession of Defendant Tova Industries, LLC's ("Tova") accountants concerning any information since January 1, 2006 referring or referencing the New Horizon Foods division of Tova Industries, LLC. Defendant shall further produce all computer data files (in native format) evidencing any work by William Ruf, Stuart Robinson or Welenken Himmelfarb & Company related to the New Horizon Foods division. Each of these productions shall be made no later than January 31, 2011.

It is undisputed that Tova has been able to obtain hard copies of documents from its

1 accountants, and Tova has made no showing that it is unable to obtain documents in the possession  
2 of its accountants that are in native electronic format. Indeed, in its papers and at the hearing,  
3 counsel for Tova was unable to apprise the court whether Tova had even requested that the  
4 accountants provide copies of the electronic documents sought in this motion, or that the accountants  
5 have refused production of such copies. Citing Federal Rules of Civil Procedure 34(b)(2)(E), Tova  
6 argues it was not required to produce electronic copies of documents it already produced in hard  
7 copy. But even if the requested documents did not go beyond mere electronic copies of documents  
8 previously produced—which they do—the electronic documents contain discoverable information,  
9 such as metadata, that is clearly not included in the hard copies of the documents produced to date.  
10 Tova made no showing that such a production would impose any burden whatsoever.

11 IT IS FURTHER ORDERED that Plaintiffs' motion is GRANTED as to Document Request  
12 Nos. 21 and 22. No later than January 31, 2011, Tova shall produce all computer data files (in native  
13 format) supporting Tova's contention that its representations of cost of goods sold, gross profit,  
14 gross profit margins and EBITDA were accurate and true. On their face, the requests are limited to  
15 documents supporting Defendants' contentions, and thus are inherently narrowly tailored to seek  
16 only relevant information. Although Plaintiffs improperly raised new issues regarding these requests  
17 in their reply,<sup>1</sup> Tova did not request any opportunity to brief those issues. At the hearing Tova did  
18 not articulate any particular burden associated with responding to these requests. An order  
19 compelling production of responsive documents is therefore warranted.

20 Dated: *January 6, 2011*

21   
22 PAUL S. GREWAL  
23 United States Magistrate Judge  
24  
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26 <sup>1</sup> Plaintiffs' failure to adequately meet and confer regarding whether Tova had responded  
27 to these two requests resulted in moving papers that erroneously claimed Tova had never responded to  
28 the requests. Understandably, Tova's only response to this portion of the motion was to point out that  
it *had* responded. Plaintiff then made its substantive arguments as to these requests for the first time in  
its reply brief, leaving Tova no opportunity to brief those arguments in advance of oral argument.  
Plaintiffs are cautioned that in the future failure to adequately meet and confer before filing a motion to  
compel may well result in summary denial of the motion.

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**EXHIBIT B**



## Scott Mangum

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**From:** Kurt Wilson  
**Sent:** Monday, January 17, 2011 1:34 PM  
**To:** Scott Mangum  
**Subject:** FW: K. Crawford v. Melzer (Expert)

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**From:** David Gilmore [mailto:dgilmore@gwvm.com]  
**Sent:** Monday, January 17, 2011 11:44 AM  
**To:** Kurt Wilson  
**Subject:** RE: K. Crawford v. Melzer (Expert)

Yes, it does. I agree that a delay to analyze the documents is appropriate.

David M. Gilmore, Esq.  
GILMORE, WOOD, VINNARD & MAGNESS, P.C.  
10 Riverpark Place East, Suite 240  
Fresno, CA 93720  
(559) 448-9800, Ext. 124  
(559) 448-9899 FAX  
[dgilmore@gwvm.com](mailto:dgilmore@gwvm.com)

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**From:** Kurt Wilson [mailto:kwilson@smwb.com]  
**Sent:** Monday, January 17, 2011 10:34 AM  
**To:** David Gilmore  
**Cc:** Scott Mangum  
**Subject:** K. Crawford v. Melzer (Expert)

David,

Given the "problems" we have had getting Tova to finally disclose its documents and information respecting the financial representations/warranties it made to Plaintiffs, I think we should agree to extend the deadline on the expert report until after Tova finally completes this disclosure. Obviously, Plaintiffs' expert cannot complete his analysis until at least a week or two after Tova finally produces the documents and discloses the information.

I'm thinking that we extend the deadline to 3/1. Does that make sense to you?

1/17/2011

Kurt

**Kurt E. Wilson, Esq.**

**Sweeney, Mason, Wilson & Bosomworth**

**983 University Ave, Suite 104C Los Gatos, CA 95032**

**Tel: 408-356-3000 Fax: 408-354-8839**

**[www.smwb.com](http://www.smwb.com)**

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1/17/2011

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**EXHIBIT C**

\*E-Filed 9/3/10\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

KENNETH L. CRAWFORD, ET AL.,

No. C 10-00280 RS

Plaintiffs,

v.

**CASE MANAGEMENT  
SCHEDULING ORDER**

ZACHARIA MELZER, ET AL.,

Defendants.

Pursuant to the Federal Rule of Civil Procedure 16, the parties attended a Case Management Conference on September 2, 2010. After considering the Joint Case Management Statement submitted by the parties and good cause appearing, IT IS HEREBY ORDERED THAT:

1. DISCOVERY.

On or before March 04, 2011, all non-expert discovery shall be completed by the parties. Discovery shall be limited as follows: (a) twelve (12) non-expert depositions per party (although each side is limited to fourteen (14) hours total of 30(b)(6) testimony from the other side); (b) thirty (30) interrogatories per party, including all discrete subparts; (c) a reasonable

CASE MANAGEMENT SCHEDULING ORDER

No. C 10-0280 RS

1 number of requests for production of documents or for inspection per party; and (d) and thirty  
2 (30) requests for admission per party.

3 2. EXPERT WITNESSES. The disclosure and discovery of expert witness opinions shall  
4 proceed as follows:

5 A. On or before January 28, 2011, plaintiff shall disclose expert testimony and reports in  
6 accordance with Federal Rule of Civil Procedure 26(a)(2).

7 B. On or before February 11, 2011, defendant shall disclose expert testimony and reports in  
8 accordance with Federal Rule of Civil Procedure 26(a)(2).

9 C. On or before March 4, 2011, all discovery of expert witnesses pursuant to Federal Rule of  
10 Civil Procedure 26(b)(4) shall be completed.

11 3. FURTHER CASE MANAGEMENT CONFERENCE. A Further Case Management  
12 Conference shall be held on **February 24, 2011 at 10:00 a.m.** in Courtroom 3, 17th Floor,  
13 United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. The parties  
14 shall file a Joint Case Management Statement at least one week prior to the Conference.

15 4. PRETRIAL MOTIONS. All pretrial motions must be filed and served pursuant to Civil  
16 Local Rule 7. All pretrial motions shall be heard no later than March 18, 2011.

17 5. PRETRIAL STATEMENTS. At a time convenient to both, counsel shall meet and  
18 confer to discuss preparation of a joint pretrial statement, and on or before April 28, 2011,  
19 counsel shall file a Joint Pretrial Statement.


20 6. PRETRIAL CONFERENCE. The final pretrial conference will be held on **May 12,**  
21 **2011, at 10:00 a.m.,** in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate  
22 Avenue, San Francisco, California. Each party or lead counsel who will try the case shall  
23 attend personally.

24 7. TRIAL DATE. Jury trial shall commence on **May 23, 2011, at 9:00 a.m.,** in  
25 Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco,  
26 California.

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CASE MANAGEMENT SCHEDULING ORDER

IT IS SO ORDERED.

Dated: 9/2/10

  
RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE

United States District Court  
For the Northern District of California

CASE MANAGEMENT SCHEDULING ORDER